IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

CWP No.1049 of 2005

Date of decision 18.5.2007

Smt.Vijay Thakur Petitioner

Vs.

Union of India and ors. Respondents

Coram:

The Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioners: Mr. T.S.Chauhan, Advocate.

For the Respondents : Mr.M.A.Khan, Central Govt. counsel for respondent No.1.

Mr.Rahul Mahajan, Advocate, for respondents No.2 and 3.

Mr.Anand Sharma, Advocate, for respondent No.4.

Rajiv Sharma,J.

The brief facts necessary for the adjudication of this petition are that the respondent No.2 had issued advertisement in the daily edition of 'Divya Himachal' dated 13th July, 2005, whereby applications were invited for retail outlets situated in various parts of Himachal Pradesh. The petitioner submitted her application for retail outlet situate at Village Ladror, District Hamirpur (H.P.). The criteria for selection of retail outlet dealers, is provided by way of brochure issued by respondent No.2 as per Annexure P-1. The petitioner vide communication dated 31.8.2005 was called for interview before the Selection Committee. She was directed to appear for interview on 16.9.2005. She appeared before the Selection

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[1] Whether reporter of local papers are allowed to see the judgment ? Yes.

Committee and her name was at serial No.2 in the panel drawn by the respondent No.3 Selection Committee. The name of respondent No.4 was reflected at Serial No.1 of the panel.

Mr.T.S.Chauhan, learned counsel appearing on behalf of the petitioner had submitted that the selection of respondent No.4 for retail out let at village Ladror is against the norms prescribed by way of brochure i.e. Annexure P-1. He had further elaborated his arguments by submitting that respondent No.4 was not entitled to maximum marks as allotted by the Selection Committee since he was not the owner of the land in question. Mr.Rahul Mahajan, learned counsel appearing on behalf of respondents No.2 and 3 had strenuously argued that the empanelment of respondent 4 was as per the norms prescribed. Mr.Anand Sharma, learned counsel appearing on behalf of respondent No.4 had supported the decision of the Selection Committee, whereby the name of respondent No.4 was reflected at Serial No.1.

To appreciate the rival contentions of the learned counsel for the parties, it will be apt to reproduce the relevant norms prescribed with Annexure P-1. Clause 16.1.1 of the brochure lays down the norms for evaluating candidates for retail outlet dealership. Each candidate as per clause 16.1.1 is to be assessed by the Selection Committee broadly under the following parameters:-

a. Capability to provide land and infrastructure/facilities	35 marks
b. Capability to provide finance	25 marks
c. Educational qualifications	15 marks
d. Capability to generate business	10 marks
e. Age	4 marks
f. Experience	4 marks
g. Business ability/acumen	5 marks
h. personality	2 marks

It is evident from the combined reading of clause 16.1.1 and parameters prescribed at page 23 (Annexure P-1) that the candidate must have a clear title to the land/registered sale deed and willing to give to the Company on long term lease at rental acceptable to respondent No.2 or on purchase basis. The maximum marks allotted for this category are 35. The suitability of the land provided for retail outlet has been assessed by the Committee for the land offered by the petitioner in District Hamirpur.

Mr.T.S.Chuahan had argued that respondent No.4 was not the owner of the land thus he could not be allotted maximum marks by the Selection Committee. Mr.Chauhan had drawn the attention of this court to order dated 28.11.2006 passed by Division Bench of the Court, reproduced as under :

> "Amongst other things it has been admitted by Mr.Rahul Mahajan appearing for respondents 2 and 3 that respondent No.4 was awarded 35 marks under the heading "land and infrastructure". It is seen that 35 marks are awardable only to such a candidate who himself has a clear title to the land or has a registered sale deed in his favour with respect thereto and is also willing to give on lease the said land to the Company on long term basis. It is admitted by Mr.Mahajan that respondent No.4 being a candidate did not show any document whereby he could be said to have had a clear title to the land offered by him or that he had a registered sale deed in his favour. Mr.Mahajan submits that respondent No.4 was holding a General Power of Attorney executed in his favour by the owner of the land and respondents 2 and 3 construed the said GPA as a clear title in his favour. Mr.Mahajan submits that GPA contains a stipulation entitling respondent No.4 to sell, lease, alienate and encumber the property…."

It is evident from the admission made by Mr.Mahajan appearing on behalf of respondents No.2 and 3 that 35 marks could only be awarded to a candidate who himself had a clear title to the land or has a registered

sale deed in his favour with respect thereto and was willing to give on lease the said land to the Company on long term basis. Mr.Mahajan has further admitted that respondent No.4 had not shown any document whereby he could be said to have a clear title to the land offered by him or that he had a registered sale deed in his favour. In view of this admitted position respondent No.4 could not be allotted 35 marks and his empanelment at Serial No.1 was arbitrary. The fact that respondent No.4 was holder of General Power of Attorney executed by Ram Chand can be gathered from the contents of application bearing CMP No.1034 of 2006. The respondent No.2 Corporation was dealing with State largess and it had to ensure that the parameters and norms prescribed with Annexure P-1 were scrupulously followed. The observation made with regard to the respondent No.2 is also applicable to the Selection Committee. The Selection Committee had wrongly allotted 35 marks to respondent No.4 though he had no clear title to the land offered by him. The Committee had transgressed its jurisdiction by empanelling respondent No.4 at Serial No.1.

The Apex Court has held in **Erusian Equipment and Chemicals Vs. State of W.B.,** 1975 (1) SCC 71 that the executive power under Article 298 of the Constitution of India of the Union and States to carry on any trade and to acquire, hold and dispose property and make contracts for any purpose is subject to Part III of the Constitution. Their Lordships of the Hon'ble Supreme Court have opined as under:

> "Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The

State has the duty to observe equality, An ordinary individual can choose not to deal with any person, The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

The State can enter into a contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment to enter into a contract, which may be proper, necessary and essential to his lawful calling."

The Apex Court has held in **Ramana Dayaram Shetty Vs. International Airport Authority of India and others,**1979 (3) SCC 489 that administrative authority is equally bound by the norms, standards and procedures laid down by it for others. The Hon'ble Supreme Court has held in the following terms:

"Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc, The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by the Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one

can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more business enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. -These resources are available for utilization by private corporations and individuals by way of lease or licence, All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognize the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/ structuring and checking Government discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, “that Government action be based on standards that are not arbitrary or unauthorized". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of

granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or gran ting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences. Etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

The Apex Court in **Kasturi Lal Lakshmi Reddy Vs. State of J&K,** 1980 (IV) SCC 1 has laid down the limitations which structure and control the discretion of the Government in regard to grant of largess by it. The first is in regard to the terms on which largess may be granted and the other, in regard to the persons who may be recipients of such largess. Their Lordships of the Hon'ble Supreme Court have held as under:

"So far as the first limitation is concerned, it flows directly from' the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the government is not free to act as it likes in granting largess such as awarding a contract or selling

or leasing out its property. Whatever be its activity, the government is still the government and is, subject to restraints inherent in its position in a democratic society .The constitutional power conferred on the government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the government must be in public interest; the government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid, It must follow as a necessary corollary from this proposition that the government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest."

The Apex Court has held in **Ajay Hasia Vs. Khalid Mujib Sehravardi,** 1981 (1) SCC 722 that any arbitrary or unreasonable action of "authority" would be violative of Article 14 of the Constitution of India.

Their Lordships have held in **Ram and Shyam Company Vs. State of Haryana and others,** *(1985) 3 SCC 267* that while disposing of public property State must give equal opportunity to all concerned and endeavour to fetch the best available price in public interest.

The Apex Court in **M/s Dwarkadas Marfatia and sons Vs. Board of Trustees of the Port of Bombay,** *(1989) 3) SCC 293* has held that any authority covered under Article 12 of the Constitution of India cannot act

arbitrarily even in contractual matters and must act only to further public interest.

In **Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,** *(1990) 3 SCC 752***,** the Apex Court has held that every administrative action must be fair and the State or its instrumentality engaged in commercial transaction must act reasonably and in just manner. The Hon'ble Supreme Court has held as under:

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See Radha Krishna AgarWal v. State of Bihar at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article

14 springs up arid judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to E.P. Royappa V. State of Tamil Nadu, Maneka Gandhi v. Union of India, Ajay Hasia v. Khalid Mujib Sehravardi, R.D. Shetty v. International Airport Authority of India and also Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay. It appears to us that rule of reason and rule against arbitrariness and discrimination; rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

The Apex Court in **Kumari Shrilekha Vidyarthi and others Vs. State of H.P. and others,** (1991) 1 Supreme Court Cases 212, has held that every decision must be based on reasons and in case of arbitrary, unreasonable, or irrational State action, Article 14 of the Constitution of India is attracted. The Hon'ble Supreme Court has held as under**:**

"Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or, public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public

office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See Ramana Dayaram Shetty v. International Airport Authority of India and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir). In CoL A.S. Sangwan v. Union of Indial while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasized as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose. It is now too well" settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect; the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode "is prescribed for doing an act and there is no impediment in

followling that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

The Apex Court has held in **Delhi Science Forum and others Vs. Union of India and another,** *(1996) 2 SCC 405* that grant of contract/licences to private bodies/companies by government or statutory authority can be judicially reviewed on grounds of bad faith, based on irrational or irrelevant consideration as well as non-compliance of prescribed procedure or violation of Constitutional or statutory provision**.**

The Apex Court has again reiterated the principles governing the distribution of state largess in **Association of Registration Plates Vs. Union of India and others,**(2005) 1 SCC 679**.** Their Lordships of the Hon'ble Supreme Court have held as under:

"Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (Supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors."

The upshot of the above discussion is that the empanelment of respondent No.4 for retail outlet at Village Ladror, District Hamirpur (H.P.), is illegal. Accordingly this writ petition is allowed. The name of respondent No.4 is directed to be struck off from Serial No.1 of the panel and respondent No.2 is directed to issue letter of intent in favour of the petitioner within a period of three weeks from the receipt of certified copy of this judgment. The petitioner is entitled to the cost quantified at Rs.5,500/- to be paid by respondents No. 2 & 3.

May 18,2007(g) **(Rajiv Sharma), J.**